UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COSTCO WHOLESALE CORPORATION,

Plaintiff,

v.

ROGER HOEN, et al.,

Defendants, and

WASHINGTON BEER AND WINE WHOLESALERS ASSOCIATION,

Intervenor-Defendant

No. C04-360P

ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS, GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS, AND DENYING MOTION FOR PARTIAL STAY

Three motions are pending before the Court. Defendant Members of the Washington State Liquor Control Board ("the Liquor Control Board") and Intervenor Defendant Washington Beer and Wine Wholesalers Association ("the Wholesalers") jointly move for judgment on the pleadings on Costco's First Claim. (Dkt. No. 29). The Liquor Control Board moves to dismiss Costco's Second, Third, and Fourth Claims. (Dkt. No. 31). The Wholesales move for a partial stay. (Dkt. No. 28). Having reviewed the parties' pleadings and supporting materials, and having heard oral argument, the Court rules as follows:

The Court DENIES the Liquor Control Board and the Wholesalers' (collectively "Defendants") Motion for Judgment on the Pleadings. Costco's First Claim alleges that the Washington state laws and regulations governing the distribution and pricing of beer and wine

(hereinafter referred to a "the Washington regulatory scheme") violate the Sherman Act. Defendants argue that the Sherman Act does not preempt the Washington regulatory scheme. Specifically, Defendants argue that the Washington regulatory scheme does not conflict with federal antitrust laws and that, even if it did, it is a unilateral restraint on trade that is not preempted by the Sherman Act. Defendants have failed to show that there is no irreconcilable conflict. Further, to the degree that the challenged regulatory scheme is a restraint on trade, it is a hybrid restraint, not a unilateral one. Thus, judgment on the pleadings dismissing Costco's Sherman Act claim is not warranted.

The Court GRANTS in part and DENIES in part the Liquor Control Board's Motion to Dismiss. The Court denies the motion to dismiss Costco's Second and Third Claims because, contrary to the Liquor Control Board's argument, Costco has standing to assert those claims. The Court grants the motion to dismiss Costco's Fourth Claim because this state law claim against the Liquor Control Board, which is a state agency, is barred under the Eleventh Amendment.

The Court DENIES the Wholesalers' Motion for Partial Stay. As discussed at oral argument and agreed to by the parties, the Court will issue an amended case schedule extending the discovery deadline, dispositive motions deadline, trial date, and associated dates by five weeks rather than staying the proceedings on Costco's Second Claim. This will allow the parties to incorporate the Supreme Court's decision in Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004), cert. granted 124 S. Ct. 2391 (May 24, 2004) and Heald v. Engler, 342 F.3d 517 (6th Cir. 2003), cert. granted 124 S. Ct. 2389 (May 24, 2004) in their dispositive motions. As soon as the Supreme Court issues its decision, the parties may file substantive briefs on this claim. Until then, the Court will not consider substantive motions on this claim. Discovery related to this claim, however, will continue.

BACKGROUND

Under the Washington regulatory scheme, both suppliers (i.e. wineries and breweries) and wholesalers must file, or "post," their sale prices with the Liquor Control Board. The posted prices are the only prices they may charge for 30 days. The parties refer to these requirements as "post and

hold" requirements. Volume discounts and sale on credit are also banned under the Washington regulatory scheme. The price charged must be the same regardless of whether the beer and/or wine is delivered by the distributor or picked up by the retailer, which as the effect of prohibiting price reductions for alternative delivery arrangements. This is called the "delivered price" requirement. The price charged must be the acquisition or production cost plus ten percent. This is called the "minimum mark-up" requirement. These requirements are set forth in RCW 66.28.180.[1]

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[1] The statute states, in relevant part:

It is unlawful for a person, firm, or corporation holding . . . a beer distributor's license, a domestic brewer's license, a microbrewer's license, a beer importer's license, a beer distributor's license, a domestic winery license, a wine importer's license, or a wine distributor's license within the state of Washington to modify any prices without prior notification to and approval of the board.

. . .

(2) Beer and wine distributor price posting.

(a) Every beer or wine distributor shall file with the board at its office in Olympia a price posting showing the wholesale prices at which any and all brands of beer and wine sold by such beer and/or wine distributor shall be sold to retailers within the state.

. . .

(c) No beer and/or wine distributor may sell or offer to sell any package or container of beer or wine to any retail licensee at a price differing from the price for such package or container as shown in the price posting filed by the beer and/or wine distributor and then in effect, according to rules adopted by the board.

(d) Quantity discounts are prohibited. No price may be posted that is below acquisition cost plus ten percent of acquisition cost. However, the board is empowered to review periodically, as it may deem appropriate, the amount of the percentage of acquisition cost as a minimum mark-up over cost and to modify such percentage by rule of the board, except such percentage shall be not less than ten percent.

. . .

(f) The board may reject any price posting that it deems to be in violation of this section or any rule, or portion thereof, or that would tend to disrupt the orderly sale and distribution of beer and wine. . . .

(g) Prior to the effective date of the posted prices, all price postings filed as required by this section constitute investigative information and shall not be subject to disclosure . . . .

(h) . . . (ii) Beer and wine sold as provided in this section shall be delivered by the distributor or an authorized employee either to the retailer's licensed premises or directly to the retailer at the distributor's licensed premises. A distributor's prices to retail licensees shall be the same at both such places of delivery.

(3) Beer and wine suppliers' price filings, contracts, and memoranda.

(a) Every brewery and winery offering beer and/or wine for sale within the state shall file with the board at its office in Olympia a copy of every written contract and a memorandum of every oral agreement which such brewery or winery may have with any beer or wine distributor, which contracts or memoranda shall contain a schedule of prices charged to distributors . . . . Whenever changed or modified, such revised contracts or memoranda shall forthwith be filed with the board as provided for

Washington state law also creates a three tier system for distribution of beer and wine. Beer and wine produced in state can be sold directly to Washington licensed retailers like Costco. In contrast, beer and wine produced out of state cannot be sold directly to retailers. Rather, it must be sold to a Washington licensed distributor, who then sells it to retailers. The only exception is that the Liquor Control Board, acting in its capacity as retailer of state liquor stores, can buy beer and wine directly from out of state suppliers; the Liquor Control Board need not utilize a distributor. (In-state beer and wine can also be sold through this distributor, but it need not be.)

Plaintiff Costco Wholesale Corporation ("Costco") filed suit against the Liquor Control Board challenging the Washington regulatory scheme. In its Complaint, Costco alleges that its unique internal inventory and distribution system, as well as the volumes it purchases, often directly from suppliers or manufactures, allow it to negotiate lower prices than its competitors. (Compl., ¶ 11). It further alleges that the Washington regulatory scheme prevents it from utilizing these strategies in purchasing beer and wine, and thus prevents it from being able to negotiate more competitive prices. (Id., ¶¶ 12-13).

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by rule. The provisions of this section also apply to certificate of approval holders, beer and/or wine importers, and beer and/or wine distributors who sell to other beer and/or wine distributors.
. . .
(b) Prices filed by a brewery or winery shall be uniform prices to all distributors on a statewide basis less bona fide allowances for freight differentials. Quantity discounts are prohibited. No price shall be filed that is below acquisition/production cost plus ten percent of that cost . . . .
. . .
(d) No brewery or winery may sell or offer to sell any package or container of beer or wine to any distributor at a price differing from the price for such package or container as shown in the schedule of prices filed by the brewery or winery and then in effect, according to rules adopted by the board.
(e) The board may reject any supplier's price filing, contract, or memorandum of oral agreement, or portion thereof that it deems to be in violation of this section or any rule or that would tend to disrupt the orderly sale and distribution of beer or wine. . . .
(f) Prior to the effective date of the posted prices, all prices, contracts, and memoranda filed as required by this section constitute investigative information and shall not be subject to disclosure . . . .
RCWA 66.28.180 (2004).

Costco's Complaint alleges three federal claims and one state claim challenging this regulatory scheme.

- First Claim: the Washington regulatory scheme violates the Sherman Act, 15 U.S.C. § 1.
- Second Claim: the Washington regulatory scheme violates the Commerce Clause of the United States Constitution because it discriminates against both out-of-state wineries and breweries and buyers of out-of-state wine and beer.
- Third Claim: the Washington regulatory scheme deprives Costco of "rights, privileges, and immunities secured by the Constitution and laws of the United States" and "thus constitute[s] a deprivation of rights actionable under 42 U.S.C. § 1983."
- Fourth Claim: the Washington regulatory scheme violates the Washington Constitution.

(Compl., ¶¶ 18-25). The Wholesalers intervened as a Defendant.

ANALYSIS

I. Motion for Judgment on the Pleadings

Under Fed. R. Civ. P. 12(c), a party may move for judgment on the pleadings "after the pleadings are closed, but within such time as not to delay the trial." The standard applied on a Rule 12(c) motion is essentially the same as that applied on a Rule 12(b)(6) motion. Even if all material facts alleged by the non-moving party are true, "[j]udgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990). As with a Rule 12(b)(6) motion, the Court must assume that any allegations of material fact are true in ruling on a Rule 12(c) motion. Merchants Home Delivery Service Inc. Hall & Co., Inc., 50 F.3d 1487, 1488 (9th Cir. 1995). The main difference between a Rule 12(c) motion and a Rule 12(b)(6) motion is the timing; a Rule 12(b)(6) motion is generally brought before the answer is filed; a Rule 12(c) motion is brought after the close of pleadings.

The Liquor Control Board and the Wholesalers jointly move for judgment on the pleadings of Costco's First Claim, which alleges that the Washington regulatory scheme violates the Sherman Act. Defendants contend that the Washington regulatory scheme is not preempted by the Sherman Act. Section 1 of the Sherman Act provides that "[e]very contract, . . . or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." In determining whether the Sherman Act preempts a state statute, the court must first determine whether there is an irreconcilable conflict between the federal and state regulatory schemes. Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982). If there is such a conflict, the next question is whether the statute is a "unilateral" or a "hybrid" restraint on trade. If the statute is a hybrid restraint, the next step in the analysis requires determining whether the state statute is immune from the reach of the Sherman Act under the test set out in Parker v. Brown, 317 U.S. 341 (1943). When the challenged state statute involves the regulation of alcoholic beverages, the court must determine whether the state statute is nonetheless valid in light of the Twenty-First Amendment. In this motion, Defendants argue 1) that there is no conflict between the state statute and the relevant federal antitrust laws, and 2) even if there is such a conflict, the challenged regulatory scheme imposes a unilateral restraint and therefore is not preempted by the Sherman Act. Defendants explicitly refrain from addressing whether immunity under Parker applies or whether the Twenty-First Amendment saves the challenged regulatory regime.

As a threshold matter, Defendants argue that the Washington regulatory regime does not conflict with the Robinson-Patman Act, 13 U.S.C. § 13 (in a footnote, they suggest there is also no conflict with the Federal Alcohol Administration Act., 27 U.S.C. § 201 et seq.). However, Costco does not allege a violation of the Robinson-Patman Act; it is not mentioned anywhere in Costco's Complaint. Defendants acknowledge this, but contend that the Robinson-Patman Act prohibits price discrimination and that the Washington regulatory scheme also prohibits price discrimination, and

therefore the Washington regulatory scheme cannot be said to conflict with federal antitrust laws merely because it has anticompetitive effects.

However, none of the cases that address whether state laws regulating the distribution and pricing of alcoholic beverages violate the Sherman Act analyze the Robinson-Patman Act. The Robinson-Patman Act is not mentioned anywhere in those cases. See 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); California Retail Liquor Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102 (1980) (hereinafter "Midcal"); TFWS, Inc. v. Schaefer, 242 F.3d 198 (4th Cir. 2001); Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987); Canterbury Liquors & Pantry v. Sullivan, 16 F. Supp. 2d 41 (D. Mass. 1998); Anheuser-Busch, Inc. V. Goodman, 745 F. Supp. 1048 (M.D. Pa. 1990). Rice mentions the Robinson-Patman Act only in passing in discussing a prior case. 458 U.S. at 660-61 (discussing Joseph E. Seagram & Sons., Inc. v. Hostetter, 384 U.S. 35 (1966)). The only case that Defendants cite to support their argument regarding the Robinson-Patman Act is Exxon Corp. v. Maryland, 437 U.S. 117 (1978). Exxon did not deal with state regulations of the sale of alcoholic beverages. It concerned state laws governing the distribution of gasoline. The plaintiff in that case explicitly alleged a violation of the Robinson-Patman Act and did not allege a violation of the Sherman Act. Id. at 122 n.5. Defendants have not explained how the Robinson-Patman Act and the argument that the Washington regulatory scheme is consistent with that Act comes into play when Costco's claim is that the Washington regulatory scheme violates the Sherman Act. In short, Defendants have not demonstrated how or why the Robinson-Patman Act is relevant in determining whether the Sherman Act preempts the Washington regulatory scheme.

Turning to the cases that address preemption under the Sherman Act, there must be an actual conflict between the state and federal regulatory schemes, not a hypothetical or potential conflict. Rice, 458 U.S. at 659. The fact that a state regulatory scheme has an anticompetitive effect does not establish an actual conflict. Rather, a state regulatory scheme "may be condemned under the antitrust laws only if it mandates or authorized conduct that necessarily constitutes a violation of the antitrust

laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." Id. at 660.

Besides the Robinson-Patman Act, Defendants's central argument is that the Washington regulatory scheme neither mandates nor authorizes concerted action among suppliers or among distributors to fix prices or otherwise restrain trade in violation of the Sherman Act. According to Defendants, the State unilaterally imposes the post and hold, minimum mark-up, and delivered price requirements as well as the ban on volume discounts; the private suppliers and distributors merely comply with the State's laws and regulations. Thus, according to Defendants, Costco can only show, at best, that the Washington regulatory scheme has anticompetitive effects, which is insufficient under Rice.

Costco counters that the state defendants in Miller made nearly identical arguments that Defendant make here and the Ninth Circuit rejected them. As such, Costco contends that Miller is directly on point and mandates that this Court deny Defendants' motion.

The parties' arguments go to the issue of whether the Washington regulatory scheme constitutes a "unilateral" or a "hybrid" restraint on trade. A unilateral restraint on trade is not preempted by the Sherman Act; a hybrid restraint is preempted. Section 1 of the Sherman Act applies only to concerted action involving separate entities. "A restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." Fisher v. City of Berkeley, 475 U.S. 260, 267 (1986). Where private entities have no control over the pricing because pricing is set by a state governmental body, the state unilaterally restrains the trade. In Fisher, the City of Berkeley enacted a rent control ordinance on residential housing, whereby the city imposed a ceiling that property owners could charge for rent. The Supreme Court held that this city ordinance was unilateral because only the city had control over the ceiling price – neither the property owners nor renters had any control at all. Id. Likewise, the city reviewed and ruled on requests by individual property owners to charge a higher

rent. As such, the ordinance was a unilateral restrain on trade and was not preempted by the Sherman Act.

In contrast, a hybrid restraint is one in which "nonmarket mechanisms merely enforce private marketing decisions." Id. at 268 (quoting Rice, 458 U.S. at 665 (Stevens, J. concurring)). When private actors or entities are granted "a degree of private regulatory power" which the state merely enforces, the regulatory scheme granting that power is subject to attack under the Sherman Act. "[T]he mere existence of legal compulsion [does] not transform a pricing scheme into a unilateral action by the state." Miller, 813 F.2d at 1350 (interpreting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) and Midcal). The Supreme Court distinguished the regulations at issue in Fisher from those in Schwegmann and Midcal. In Schwegmann, a Louisiana statute authorized distributors to select minimum retail prices via contracts with retailers that the distributors could enforce, even against retailers that had not signed the contract. The Court found that this statute gave the distributors the discretion to set and enforce retail prices, which was a violation of the Sherman Act, despite the fact that retailers were compelled by statute to adhere to the prices and did not necessarily enter an agreement with distributors. 341 U.S. at 389-90. In Midcal, a California statute required that wine producers file or "post" retail prices with the state for wine. If the producers did not do so, the wholesalers were required to post the prices. The law required that all wine sold to retailers be sold at the posted prices. Further, a single wholesaler's posted price bound all other wholesalers; they could not sell wine below that posted price. The Court concluded that the state laws were properly attacked under the Sherman Act because the state had no direct control over the prices and did not review them for reasonableness. Instead, the state "simply authorize[d] price setting and enforce[d] the prices established by private parties." 445 U.S. at 105-06. In contrast, in Fisher, the city of Berkeley had complete control over rent prices. 475 U.S. at 269.

The Ninth Circuit Miller case is particularly instructive because the parties in that case made similar arguments as the parties do here. In Miller, Oregon regulations governing the sale and

distribution of beer and wine required posting prices with the state and charging only those prices, prohibited quantity discounts, and required that the posted price be the delivered price regardless of transportation costs. If the price decreased from the previous price, the decreased price was to remain in effect for 180 days for beer and 30 days for wine after the effective date (this regulation was called a "post-off" rule). Additionally, prices were deemed effective 10 days after posting them with the state. As such, competitors could learn of each other's future prices before the prices became effective. Miller, 813 F.2d at 1346 & n.1.

When the case was before the district court, the state defendants argued that the regulations only required that wholesalers act unilaterally in response to the state regulations and did not compel or authorize agreements among wholesalers to restrain trade. Miller v. Hedlund, 579 F. Supp. 116, 119 (D. Or. 1984). In ruling on summary judgment motions, the district court agreed with the state defendants that the price-posting and post-off rules were unilateral because there was no agreement among wholesalers to restrain trade. Rather, each wholesaler was free to set its own price, without regard to the prices set by other wholesalers. As such, the district court concluded that the state regulations did not authorize or mandate agreement between or concerted action among wholesalers. Id. at 120-21. The district court distinguished the delivered price and quantity discount rules. The court noted that these rules "require wholesalers to adhere to identical horizontal restraints" as a condition of doing business in the state and concluded that these rules may mandate conduct that constituted an agreement in violation of the Sherman Act. Id. at 121.

On appeal, the Ninth Circuit reversed the district court's ruling that the price-posting and post-off rules were unilateral and affirmed the ruling that the delivered price rule was hybrid (the ruling on the quantity discounts was not appealed). In appealing the ruling on the price-posting and post-off rules, the retailers argued that a separate agreement in restraint of trade was not necessary to find that the price-posting and post-off rules violated the Sherman Act. Miller, 813 F.2d at 1347-48. The state defendants made the same arguments to the Ninth Circuit that they made to the district court. Id. The

Ninth Circuit rejected the state defendants' argument. It first noted that if the wholesale distributors had entered an agreement on their own to adhere to previously announced prices and terms of sale, it would violate the Sherman Act, "even though advance price announcements are perfectly lawful and even though the particular prices and terms were not themselves fixed by private agreement." Id. at 1349 (quoting Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980)). The court went on to conclude that:

> While it is true that there is no agreement or concerted activity among the wholesalers, it can not be ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices. In other words, the state compels activity that would otherwise be a per se violation of the Sherman Act.

Id. The court concluded that the Oregon regulations were more akin to those in Schwegmann and Midcal than in Fisher. Id. at 1349-50. Consequently, the court held that the Oregon price-posting, post-off, and delivered price rules were hybrid restraints because the state allowed private parties to set prices and did not review them for reasonableness,[2] regardless of whether there was concerted activity among the wholesalers or not. Id. at 1350-51. A leading treatise on antitrust law interprets Fisher and the other cases similarly: "Although the Court [in Fisher] thus seemed to hold that an illegal agreement was a prerequisite to preemption, it did not do so in fact, for it readily reaffirmed the preemptions found in Schwegmann and Midcal" with the crucial issue being the degree of state control over prices. Phillip E. Areeda & Harbert Hovenkamp, Antitrust Law § 217b at 311 (2d ed. 2000).

A more recent case in the Fourth Circuit reached a similar result. In TFWS, Maryland law established a "post-and-hold" system similar to Oregon's. It required wholesalers to file price schedules and proposed price changes for the following month, which were made available to their

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[2] When this case had been before the Ninth Circuit before at a different stage in its proceedings, the Ninth Circuit noted that even though the state could reject any posted price if it violated the state's rules, "the effect of that rule is simply to effectuate the price posting and the prohibitions on quantity discounts and transportation allowances. It does not provide for government establishment or review of the prices themselves." Miller v. Oregon Liquor Control Comm'n, 688 F.2d 1222, 1227 (9th Cir. 1982).

competitors, who could file amended price schedules in response before any of the prices became effective. The wholesalers were required to sell to retailers at the posted prices. The law also banned volume discounts. TFWS, 242 F.3d at 202-03. The court concluded that:

> The post-and-hold system is a classic hybrid restraint on trade: the State requires wholesalers to set prices and stick to them, but it does not review those privately set prices for reasonableness; the wholesalers are thus granted a significant degree of private regulatory power. The volume discount ban is a part of the hybrid restraint because it reinforces the post-and-hold system by making it even more inflexible.

Id. at 208-09. These cases teach that the difference between a unilateral restraint and a hybrid restraint comes down to the degree of control or discretion that the private entities have over the price together with the state law requirement that these prices be adhered to for a certain length of time, and does not depend on there being an agreement among the wholesalers or other private parties to adhere to previously agreed upon prices.

The Washington regulatory scheme is very similar to Oregon's in Miller and Maryland's in TFWS. The Washington regulatory scheme imposes the following requirements on wine and beer distributors and suppliers:

- They must post prices with the Liquor Control Board;
- They must sell only at the posted prices;
- They must charge only those posted prices for at least 30 days;
- They must set prices that are at least the acquisition or production cost plus a 10% markup;
- The Liquor Control Board may reject the posted price if it violates state laws or if the price would "disrupt the orderly sale and distribution of beer and wine";
- Quantity discounts are prohibited;
- The price a retailer pays must be the same regardless of whether the distributor delivers or the retailers picks up the product.

When Costco filed this lawsuit, suppliers and distributors posted prices near the beginning of the month for the prices to become effective the following month. These future posted prices were made

public with the result that competitors could see them and adjust their own price postings accordingly. After Costco filed this lawsuit, the state amended that provision of the statute so that the future posted prices are not made public until they become effective. This change makes Washington's regulatory scheme somewhat different than Oregon's and Maryland's.

Under the Washington regulatory scheme, like Oregon and Maryland, suppliers and distributors set their own prices, which the Liquor Control Board does not review for reasonableness, but which are enforced by the state by "holding" these as the only lawful prices for 30 days. As in Miller and TFWS, this gives the suppliers and distributors "a degree of private regulatory power," which makes the regulatory scheme a hybrid restraint not a unilateral one. As in Miller and TFWS, the ban on quantity discounts and discounts for alternative delivery arrangements further reinforces this system by making it even more inflexible by requiring suppliers and distributors to adhere to indirect horizontal restraints.[3]

Defendants argue that while it is true that the suppliers and distributors have the power to set their own prices under the Washington regulatory scheme, this does not make the restraint a hybrid one. Defendants first argue that the key Supreme Court cases Midcal and 324 Liquor Corp. (upon which Miller and TFWS relied), are distinguishable because in those cases, the challenged laws allowed sellers in one tier to control the resale prices in another tier. However, even if that was the

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[3] Defendants maintain that the Court must give separate consideration to each of the challenged statutory and regulatory provisions and, pursuant to state law, sever any that are found unlawful. Costco disputes this, citing Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690 (1962), which held that "the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." Id. at 699 (quotation and citation omitted). Defendants reply that Continental Ore does not apply in this case because it involved private parties that allegedly engaged in an unlawful conspiracy in violation of the Sherman Act, whereas this case involves a state regulatory scheme. This argument is not persuasive. There is no reason why the same principle should not apply when the allegation is the state law amounts to a hybrid restraint on trade. In fact, the Supreme Court implicitly did just what Continental Ore required in Midcal and 324 Liquor Corp. – the Court looked at the state regulatory scheme as a whole to determine whether it amounted to a hybrid restraint on trade that was a per se violation of the Sherman Act.

situation in Midcal and 324 Liquor Corp., it was not the situation in Miller and TFWS. In both Miller and TFWS, the courts nonetheless held that the challenged laws were hybrid restraints.

Second, Defendants argue that Miller and TFWS are distinguishable because their holdings were based on the fact that the challenged regulatory scheme made future posted prices public before they become the effective posted prices, and thereby "facilitated" private parties working together to fix prices. According to Defendants, the amended Washington regulatory scheme does not facilitate such conduct, and therefore there is no preemption. This argument is not persuasive because neither Miller nor TFWS premised its holding that the regulatory schemes amounted to a hybrid restraint on this aspect of those regulations. TFWS did not point to this aspect of the regulatory scheme in concluding that it amounted to a hybrid restraint. Rather, the court concluded that it was a hybrid restraint because the state required wholesalers to set prices and stick to them and did not review those prices for reasonableness.[4] 242 F.3d at 208-09. Miller stated that the "challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices[,]" which is state compelled activity that would otherwise be a per se violation of the Sherman Act. 813 F.2d at 1351 (emphasis added). The problem was not only that the regulations facilitated the exchange of price information, but also that they required adherence to publicly posted prices. Here, the Washington regulatory scheme explicitly requires adherence to publicly posted prices for 30 days. While the Washington regulatory scheme no longer makes the future posted prices public, it is too early in the case to conclude that the scheme does not somehow otherwise facilitate the exchange of price information.

The only remaining issue is whether the Washington regulatory scheme constitutes a per se violation of the Sherman Act. See TFWS, 242 F.3d at 207, Canterbury, 16 F. Supp. 2d at 46.

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[4] In contrast, the court did discuss this aspect of the regulatory scheme in addressing whether it constituted a per se violation of the Sherman Act. TFWS, 242 F.3d at 209-10. However, whether the Washington regulatory scheme is a per se violation is a separate issue, discussed below.

Defendants, in moving for dismissal of Costco's Sherman Act claim, explicitly refrain from reaching this question (they maintain that they need not reach it because the Washington regulatory scheme is a unilateral restraint). (Defs' Mot. at 1; Defs' Reply at 5). While Costco argues in its response that the Washington regulatory scheme is a per se violation, Costco is not the moving party. Therefore, the Court does not reach this issue.

II. Motion to Dismiss

A. Costco Has Standing to Bring Its Second and Third Claims

The Liquor Control Board argues that Costco's Second and Third Claims should be dismissed because Costco lacks standing to bring these claims. Three conditions must be satisfied to establish standing: 1) the plaintiff must have suffered an injury in fact that is both "concrete and particularized" and actual or imminent, 2) there must be a causal connection between the injury and the challenged conduct, and 3) it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996). The party invoking jurisdiction, which is Costco in this case, has the burden of establishing these elements. Lujan, 504 U.S. at 561. However, at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice . . . ." Id. Costco satisfies each of these three conditions. Therefore, Costco has standing to bring its Second and Third Claims.

The Liquor Control Board's argument that Costco cannot show actual and particularized injury as a result of the Washington regulatory scheme is unpersuasive. The Supreme Court has made clear that a "generalized grievance" generally does not confer standing, but has limited this to instances where the harm at issue is of an "abstract and indefinite nature." Federal Election Comm'n v. Akins, 524 U.S. 11, 23 (1998). In contrast, a harm that is concrete, though widely shared, satisfies the injury requirement to establish standing. Id. at 24. Costco alleges that the challenged regulatory scheme prevents it from obtaining competitive prices for beer and wine. Taking Costco's factual

allegations as true, as the Court must at this early stage in the litigation, this is a sufficiently concrete injury, regardless of the fact that the majority of other retailers suffer the same injury by not being able to purchase directly from out-of-state suppliers.

Second, the causation element requires that plaintiff's injury be "fairly traceable" to the challenged conduct and not the result of an independent action by a third party not before the court. Lujan, 504 U.S. at 561 (quotation and citation omitted). The Liquor Control Board argues that causation is speculative because the link between the Washington regulatory scheme and obtaining lower prices for beer and wine is weak. The Liquor Control Board relies on San Diego County Gun Rights Comm, in which plaintiff challenged a federal law regulating the manufacture and distribution of certain guns. The plaintiff, a group of gun purchasers, argued that its members suffered an economic injury because the federal law caused the price of certain guns to increase. The court rejected this argument, holding that plaintiff had failed to show that the alleged economic injury was fairly traceable to the challenged law. 98 F.3d at 1130. The court noted that a state law also regulated the guns at issue, thereby affecting the price. Additionally, the court noted that the third party dealers and manufactures, not the government, raised the prices. Any injury was a result of actions by those third parties who were not before the court. Id.

This case is distinguishable. The Liquor Control Board has not pointed to any other statutes that prevent Costco from dealing directly with out-of-state beer and wine suppliers to obtain lower prices. Again, taking Costco's factual allegations as true, Costco could likely obtain lower prices if not for the Washington regulatory scheme. As an example, Costco points to a provision in the Washington regulatory scheme requires that the in-state distributor add at least a minimum 10% markup. Therefore, Costco has satisfied the causal connection requirement.

Third, because Costco has and will continue to suffer actual injury which is fairly traceable to the Washington regulatory scheme, the third element of redressiblity is satisfied. If Costco is

successful on the merits of its claims, a favorable ruling deeming the Washington regulatory scheme unlawful would remove the cause of Costco's injury.

Lastly, the Liquor Control Board argues that Costco is asserting the legal rights of third parties – the out-of-state beer and wine suppliers – which cannot establish standing. The Liquor Control Board relies for support on a Seventh Circuit case in which the court addressed an Indiana law that prohibited consumers from buying wine directly from out-of-state producers. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (2000). Defendants there raised a similar argument on standing that the Liquor Control Board raises here. The defendant in Bridenbaugh argued that the plaintiff-consumers lacked standing because the only law plaintiffs challenged was one that regulated sellers, not consumers. The court rejected that argument and held that plaintiffs had standing, in part because they sought to buy wine that was not carried by Indiana resellers and in part because plaintiffs had to pay more for the wine bought through Indiana resellers due to excise taxes. Id. at 849-50. The court concluded that "[p]laintiffs need not be the immediate target of a statute to challenge it." Id. More significantly, the court held that plaintiffs' claim was direct not derivative: "every interstate sale has two parties, and entitlement to transact in alcoholic beverages across state lines is as much a constitutional right of consumers as it is of shippers – it if is a constitutional right at all." Id. Here, Costco is one party to a sale that would occur between it and the out-of-state suppliers if not for the challenged regulatory scheme. Therefore, as in Bridenbaugh, this Court concludes that Costco is asserting its own rights, not those of third party out-of-state suppliers. The fact that the out-of-state beer and wine suppliers would also have standing to challenge the Washington regulatory scheme does not negate the fact that it has standing in its own right.

B. The Eleventh Amendment Bars Costco's Fourth Claim

The Liquor Control Board argues that Costco's Fourth Claim alleging violations of the Washington Constitution is barred under the Eleventh Amendment. The Supreme Court interprets the Eleventh Amendment as making states immune from suit brought in federal court by its own citizens.

However, when a suit challenges the federal constitutionality of a state official's actions, the suit is treated as though it is not brought against the state, and as such, the suit is not barred by the Eleventh Amendment. Ex parte Young, 209 U.S. 123 (1908). This is known as the Ex parte Young doctrine or exception. The Ex parte Young doctrine applies only to federal claims. The Supreme Court made clear in Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984), that the doctrine does not apply to state law claims against state officials. The Supreme Court outlined the rationale underlying this rule as follows:

> A federal court's grant of relief against state officials on the basis of state law . . . does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Id. at 106. The supplemental jurisdiction statute does not provide a backdoor entry into federal court for state law claims against state officials that are barred under the Eleventh Amendment. Id. at 121. While Pennhurst has been criticized because it ignores the interests of judicial economy that usually justifies supplemental jurisdiction, it is binding precedent that has never been overruled. See McNeilus Truck and Mfg., Inc. v. Ohio ex rel. Montgomery, 226 F.3d 429, 438 & n.1 (6th Cir. 2000) ("the Pennhurst decision is the governing Supreme Court precedent, whose wisdom this court may call into question, but whose command this court must follow").

Costco's Fourth Claim alleges that the Washington regulatory scheme violates the Washington Constitution "by establishing and supporting monopoly power, imposing a trust, fixing prices, limiting production, regulating transportation, conferring privileges and immunities, lending state credit, and discriminating against out-of-state wineries and brewers and against retailers such as Costco." (Compl., ¶ 25). This is a state law claim against the Liquor Control Board where the state of Washington is the real party in interest. As such, Pennhurst requires that this claim be dismissed as

barred under the Eleventh Amendment. The claim is dismissed without prejudice so that Costco can bring the claim in state court if it chooses.

Costco mounts two arguments to attempt to overcome this result. First, it argues that Pennhurst is limited to situations where "a plaintiff seeks to enjoin state officials who are alleged to have violated state statutes that give them broad discretion in carrying out their duties." (Costco's Resp. at 9). Costco maintains that the Washington constitutional provision that is the basis for this claim commands action by state officials of the Liquor Control Board rather than giving them discretion. At oral argument, counsel for Costco was forthright in admitting that this argument rests on a novel interpretation of Pennhurst, and that no court has interpreted Pennhurst in the manner Costco does here. The Court agrees. Moreover, to interpret Pennhurst as Costco proposes would ignore the rationale in Pennhurst. Compelling a state official to comply with a federal court's interpretation of state law, regardless of whether the state law creates discretionary or mandatory duties, does not touch on federal law and instead "conflicts directly with the principles of federalism that underlie the Eleventh Amendment."

Second, Costco argues that the Liquor Control Board has waived by its conduct any sovereign immunity defense. Costco points to the fact that the Liquor Control Board did not object to the intervention by the Wholesalers. Costco seems to argue that the Liquor Control Board agreed to have this Court adjudicate the state law claim by failing to object to intervention while knowing that one of Costco's claim was a state law claim. In the alternative, Costco argues that the Liquor Control Board has invoked state law in the motion for judgment on the pleadings and thereby consented to adjudication by this Court. Both arguments fail. Neither is a sufficiently clear waiver, as is required by the case law. Waiver of sovereign immunity is not inferred easily: "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." Edelman v. Jordan, 415 U.S. 651, 673 (1974). Rather, there must be either express language indicating waiver or, if not express, some statement that no other reasonable conclusion other than waiver is possible. Id. Here,

failing to object to intervention by a third party when there is a claim alleged that is likely barred by the Eleventh Amendment cannot be said to constitute an express intent to waive the state's sovereign immunity.[5] Further, the Liquor Control Board did not argue that the Washington regulatory scheme is valid under the Washington Constitution in the motion for judgment on the pleadings. All it did was cite to the various state law provisions that are challenged and argue that they are not preempted by federal law. This can hardly be said to constitute a waiver. In contrast, the Liquor Control Board explicitly asserted this Eleventh Amendment defense in its answer. (Answer, ¶ 29). In sum, there is no support for the proposition that the Liquor Control Board waived its sovereign immunity defense.

Lastly, because the Court dismisses Costco's Fourth Claim as barred by the Eleventh Amendment, it is not necessary to reach the Liquor Control Board's alternative argument that the Fourth Claim should be dismissed for failure to state a claim.

CONCLUSION

The Court DENIES the Liquor Control Board and the Wholesalers' (collectively "Defendants") Motion for Judgment on the Pleadings. Defendants have failed to show that there is no irreconcilable conflict. Further, the challenged regulatory scheme is a hybrid system of regulation, not a unilateral one. Thus, judgment on the pleadings dismissing Costco's Sherman Act claim is not warranted.

The Court GRANTS in part and DENIES in part the Liquor Control Board's Motion to Dismiss. The Court denies the motion to dismiss Costco's Second and Third Claims because, contrary to the Liquor Control Board's argument, Costco has standing to assert those claims. The Court grants the motion to dismiss Costco's Fourth Claim because this state law claim against the Liquor Control Board, which is a state agency, is barred under the Eleventh Amendment.

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[5] Contrary to Costco's suggestion otherwise, if the claim is dismissed, Costco cannot still assert it against the Wholesalers because the state is an indispensable party in determining the validity of its own statutes under its own constitution.

The Court DENIES the Wholesalers' Motion for Partial Stay for the reasons discussed at oral argument.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: December 1, 2004

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

Rogen, L. Marilyn-SEA

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